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THE LIMITATION ACT OF 1960 (QUEENSLAND)

by

JOHN P. KELLY

Solicitor of the Supreme Court of Queensland

The Limitation Act of 1960 was assented to on 24 March 1960 and by s. 3 thereof shall come into force on 1 May 1961. The Act is substantially based on The Limitation Act of 1939 (England), which legislation has been followed in Victoria in The Limitation of Actions Act of 1958 and in New Zealand by The Limitations Act of 1950.

The theoretic justification for legislation of this character is to be found in the principle that people who have suffered wrong should assert their rights within a reasonable time. The law in this connexion first introduced into Queensland was to be found in the old Imperial statutes: the Limitation Act of 1623 and the Statute of Frauds Amendment Act of 1828. These Acts were later replaced by statutes of the Queensland parliament, namely, the Statute of Frauds and Limitations Act of 1867 and the Distress Replevin and Ejectment Act of 1867, respectively adopting in substance the Imperial statutes entitled the Real Property Limitations Act of 1833 and the Mercantile Law Amendment Act of 1836. The provisions of the English Real Property Limitation Act of 1874 were never adopted in Queensland. The present law in Queensland is accordingly to be found in ss. 16 to 28 of the Statute of Frauds and Limitations, which relate to actions on contract and in tort, actions on a specialty, actions for moneys charged upon land, such as mortgages and legacies and interests in estates, and in ss. 1 to 31 of the Distress Replevin and Ejectment Act of 1867 which govern actions for the recovery of land and the extinction of title at the end of the limitation period. In addition, s. 52 of the Trustees and Executors Acts 1897 to 1924 deals with limitations on actions against trustees. All these provisions are repealed by the new legislation.

The periods of limitation

Broadly summarized, the new Act fixes the limitation period for the commencement of actions on contract and in tort at six years (s. 9(1)(a)). Under the existing law the periods of limitations for actions in tort vary. For example, actions for oral defamation may be brought within two years and for written defamation in six years. The limitation for actions for trespass on the person is four years and in respect to trespass upon land, six years. The new Act, however, will preserve the periods of limitation prescribed by other legislation (s. 5). Thus, the Law Reform (Limitation of Actions) Act of 1956 fixes a period of three years as the limitation period in respect of actions arising out of fatal accidents and for injury to the person. These periods will remain unaffected. Other examples of special periods of limitation which will remain will be found in the Local Government Acts, the Police Acts and the Railway Acts. It is a great pity that simple uniformity was not adopted in all these instances.

The limitation period of six years is also applied by the new legislation to actions to enforce an award, where the submission is not by an instrument under seal, to actions to enforce a recognizance, to actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture (s. 9(1) (b) to (d)) and to actions for accounts in respect of any matter which arose more than six years before the commencement of the action (s. 9(1)(e)). The specific limitation of the six year period to actions for the recovery of a sum recoverable by virtue of any enactment removes the necessity for considering whether such an action is an action for a specialty and thus adopts the Lord Wright report that actions for debt and upon statute should be treated as of the same nature.

Section 9(3) prescribes twelve years (twenty years, at present) as the period within which a specialty may be brought, but this provision is to be read subject to any other provision in the Act prescribing a shorter period, for example, s. 24(5) fixes the period of limitation as six years in respect to the recovery of interest, etc., payable under a mortgage. A like period of twelve years is prescribed as the period within which an action may be brought on a judgment.

Two years is fixed as the period of limitation in respect of an action to recover any penalty or forfeiture recoverable by virtue of any enactment but "penalty" does not include a fine to which a person is liable on conviction of a criminal offence (s. 9 (5)).

Section 9(7) qualifies the section by providing that the section shall not apply to any equitable claims for an injunction, or for specific performance or for other equitable relief, for example, where there is innocent misrepresentation or mistake, except where the courts of relief follow the law.

Section 10 provides for one period of six years running from the date of the first conversion where there are successive conversions and subsection (2) of this section introduces for the first time into our law the principle of extinction of title to chattels after a period of limitation, a principle which hitherto was applied only to land. The title of the owner, however, is only extinguished after the six year period as against a purchaser or mortgagee or other person having a title to or interest in the chattel bona fide for value.

Sections 11 to 23 prescribe the periods of limitation in respect to actions to recover land. The basic period is reduced from twenty to twelve years, but important changes in the law are provided in respect to the accrual of rights of action. The right of the person bringing an action to recover land accrues from the date of dispossession (where the dispossessor came in and took possession) or discontinuance (where the claimant went out and was followed in by others)—if a person goes out but is not followed by others, mere abandonment does not set time running. In the case of death, if the person entitled to possession dies whilst still in possession, and a stranger seizes possession, time will begin to run from death and not from the date of the seizure. This is a change in the law (s. 12).

Section 13 provides the periods in relation to holders of future interests, making the date upon which time begins to run dependent upon whether the person entitled to the preceding estate was in possession when that estate determined, the period being twelve years from the date when the estate falls into possession or if the person entitled to the preceding estate is not in possession at the date of determination, the longer of two alternative periods, namely, twelve years from the time when the cause of action accrued to the person entitled to the preceding estate, or six years from the date of the determination of that estate. This alters the present law which provides that the time does not run against the holder of a future interest until he is entitled to possession (applied in *Finucane* v. *Registrar of Titles*, [1902] St. R. Qd. 75).

Section 14 prescribes the periods applicable in the case of settled land and land held on trust. Equitable interests in land and equitable interests in the proceeds of sale of land are deemed to be realty for the purposes of the Act and in general the provisions of the Act apply to these interests. Under the law as it presently stands, where a beneficiary claims title by adverse possession he acquires title if he has occupied the land to the exclusion of the trustees and the other beneficiaries. Under the Act, however, it is provided that unless he is solely and absolutely entitled to the land time shall not run against a tenant for life, trustee or beneficiary. The new Act also provides that a trustee may bring an action on behalf of a beneficiary for the recovery of land if the right of the beneficiary to recover the land has not accrued or been barred.

Section 15 deals with the accrual of right of action in case of forfeiture or breach of condition, and s. 16 makes provision for the applicable periods relative to certain tenancies. Subsections (1) and (2) of the latter section dealing with tenancies at will and tenancies from year to year re-enact ss. 15 and 16 of the Distress Replevin and Ejectment Act of 1867, and subsection (3) re-enacts the provisions of s. 17 of that Act.

Section 17 re-declares the important principle that a right of action does not accrue unless there is adverse possession, there must be both absence of possession by the plaintiff and actual possession by the defendant and there must be continuity of the adverse possession. Receipt of rent under a lease in writing by a stranger is deemed to be adverse possession of the land.

Section 18 dealing with the limitation of redemption actions re-enacts s. 30 of the Distress Replevin and Ejectment Act, except that the period is reduced from twenty years to twelve years and that these provisions are now subject to the disabilities provisions.

Section 19 providing that no right of action is to be preserved by formal entry or continual claim and s. 20 dealing with limitations to apply as between joint owners, re-enact ss. 18 and 19 of the Distress Replevin and Ejectment Act. Section 21 prescribes that for the purposes of the provisions relative to

actions for the recovery of land an administrator shall be deemed to claim as if there had been no interval between the death and the grant. The term "administrator of the estate of a deceased person" is somewhat loose.

Section 22 substantially re-enacts s. 5 of the Distress Replevin and Ejectment Act but is expressly made subject to the Real Property Acts 1861 to 1956. The effect of the provision is that after the limitation period has expired the title of any person to the land shall be extinguished but if the land is under the Real Property Acts the procedure to obtain a possessory title is saved.

Six years is the period provided by s. 23 within which an action for the recovery of rent must be commenced as is substantially now provided by s. 2 of the Statute of Frauds and Limitations.

The provisions of s. 24 dealing with action to recover money secured by mortgage or charge or to recover proceeds of the sale of land are important. There was formerly no period of limitation in respect of the principal sum of money secured by a mortgage on personal estate. The period, whether the mortgage is on real or personal estate, is fixed by the new legislation at twelve years; the period previously for real property mortgages being twenty years. In respect of mortgaged personal property no foreclosure action shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued (subsection (2)) but the section does not apply to a foreclosure action in respect of mortgaged land, it being expressly provided that the provisions of the Act relating to actions to recover land shall apply to such actions (subsection (4)). The implications of this section in respect to Torrens system mortgages raise difficult problems. Indeed, one is left with the impression that this section has been enacted without a due regard to a system of registration of mortgages.

Sections 25 and 26 deal with actions in respect of trust property or the personal estate of deceased persons. Section 52 of the Trustees and Executors Acts is repealed but its provisions are substantially incorporated into s. 25. Section 26 amends the present law as contained in ss. 18 and 19 of the Statute of Frauds and Limitations.

Disabilities

Part III of the Act (ss. 27 to 31) makes provision for extension of the periods of limitation in the case of disability, acknowledgment, part payment, fraud and mistake, and substantially alters the present law.

The old disabilities of coverture and absence beyond the seas are now omitted. Infancy is retained. The disability of "unsound mind" is substituted for lunacy and a new disability of imprisonment in those cases where the estate is not vested in the Public Curator is added (s. 4(2)). A very careful definition of the disability of unsound mind is contained in

s. 4(3). The loose term "mentally sick" is not used but the words "a patient within the meaning of the Mental Hygiene Act of 1938" is used (cf., however, the definition of mentally sick persons in the Real Property Acts 1861 to 1956, s. 3) (a); a definition broadly corresponding to s. 647 of the Criminal Code is incorporated (b) and a definition to remedy the position in *Harnett* v. *Fisher*, [1927] A.C. 573 is adopted (c).

Part IV (ss. 32 to 35) contains general provisions. Section 32 provides for the application of the Act and other enactments to arbitration. Section 33 makes provisions for set-off and counterclaim. Nothing in the Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise (s. 34) (amending s. 20 of the Principal Act).

Under the 1952 Amendment to the Real Property Acts, a possessory title may be granted by shortened procedure where the adverse possession is forty years or more. As the maximum period in relation to successive disabilities is reduced by the new Act from forty years to thirty years, the new Act correspondingly reduces the period after which the shortened procedure may be applied from forty years to thirty years.

One of the features associated with the passing of this valuable reform was the excellent explanatory memorandum circulated by the Minister for Justice. These notes acknowledge their indebtedness to this memorandum.

RECENT LEGAL PUBLICATIONS

CRIMINAL SCIENCE

Essays in Criminal Science by G. O. W. Muellor (Sweet & Maxwell).

FORMS & PRECEDENTS

The Australian Encyclopaedia of Forms and Precedents Cumulative Supplement, 1956-1961, edited by L. A. Harris, B.A., LL.B. (Butterworth & Co. (Aust.) Ltd.).

INDUSTRIAL LAW

Nolan & Cohen's Industrial Laws Supplement (Federal and New South Wales), 1958-1961, edited by C. P. Mills, B.Ec., LL.B. (Butterworth & Co. (Aust.) Ltd.).

LAW LIST

Law List of Australia and New Zealand, 48th Edition, 1961 (Butterworth & Co. (Aust.) Ltd.).

MATRIMONIAL CAUSES

Matrimonial Causes Jurisdiction by Zelman Cowen and Derek Mendes da Costa (Law Book Company of Australia).

STAMP DUTIES

The Law of Stamp Duties, 3rd Edition, by J. G. Monroe, B.A. (Sweet & Maxwell).

LEGAL LIABILITY OF ACCOUNTANTS

by
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Since the Court of Appeal's decision in *Candler* v. *Crane Christmas & Co.*, [1951] 1 All E.R. 426, it must now be taken as settled law that an accountant's duty of care in preparing and certifying accounts and balance sheets extends no further than to those persons with whom he has a contractual or fiduciary relationship. In spite of a vigorous dissenting judgment by DENNING, L.J., in which he inferentially deplored as timorous the attitude of COHEN and ASQUITH, L.JJ., who gave the majority decision of the Court, an attempt to extend the principles of *Donoghue* v. *Stevenson*, [1932] A.C. 562 to statements and representations failed. I am not aware of any recent case in which our local courts have had to deal with the problem, but it can, I think, be taken for granted that *Candler's Case* will be followed here, and that it will now take a decision of the House of Lords or a statutory enactment to alter the law which it establishes.

It seems unfortunate that the law should have developed thus. Although it may be going too far to quote, as DENNING, L.J., did, that "a country whose administration of justice did not afford redress in a case of the present description would not be in a state of civilization", nevertheless it offends one's sense of justice that a professional person who knows very well that another is relying upon, and acting upon, his special skill and judgment should be under no legal liability to that other for even the grossest carelessness, unless fraud can be established. The truth of the matter is that the public at large has a special faith in accounts prepared or audited by qualified and independent accountants. They are commonly expected to exercise the objective and impartial care of judges, irrespective of who happens to pay their fees, and to the layman it comes as a shock to learn that, in the absence of a special fiduciary relationship, no responsibility in law is owed by them to anybody but their paymasters.

Unlike most people rendering professional services, it is the rule rather than the exception with accountants that persons other than those employing them will be vitally interested in the results of their labours. If a tooth is badly pulled, the patient alone suffers from the dentist's lack of skill, but if accounts are badly prepared, if a balance sheet is drawn up that misrepresents the client's liabilities and assets, the client may well suffer far less than others with whom he has business relations. It will affect alike potential investors in, and lenders to, the client's business, bankers, suppliers of goods and services on credit and the taxation authorities. The accountancy profession generally shows full consciousness of this position. No profession this century has shown more zeal in raising its professional standards both ethically and in the knowledge and skill required from persons entering its practice. Yet the Law in this respect lags far behind the standard set by the profession for itself and expected of it by the public.

The matter obviously is one needing the attention of the Legislature. Any extension of liability by Statute will need careful and precise definition. If the *Donoghue* v. *Stevenson* principle were to be given its full effect, one might have the extreme situation, to which ASQUITH, L.J., alludes, of a cartographer being liable to pay millions of pounds in damages for the loss of the "Queen Mary" on a reef which he had carelessly failed to show on his charts. This is, of course, a far cry from the facts in *Candler's Case*, where the accountants well knew that the accounts they prepared were specifically intended to be used for the purpose of inducing Mr. Candler to invest money in the company, and where their clerk was brought, in the course of his duties, into personal contact with the plaintiff. Somewhere between the two extremes sweet reasonableness could, no doubt, plot a satisfactory line of demarcation. Perhaps liability might reasonably be limited:—

(1) to persons specifically in contemplation as ones intended to use the accounts when prepared; and

(2) to those transactions only for which the accounts were known to be required by those persons.

Where, by reason of a contract or a fiduciary relationship, a legal duty is cast upon an accountant in the preparation of accounts or upon an auditor in their verification, such a duty has two main facets. The first is concerned with the skill with which the work should be done, the second with the secrecy which should be maintained of the confidential information concerning the client's affairs which inevitably comes to the accountant's knowledge.

The nature of the care to be taken, like all standards of skill, must be set by the general usage of the profession. The continual improvement in the general standards of the accountancy profession, to which I refer above, should therefore be gradually having its effect. Some of the earlier cases required of the accountant no more skill than that of being an accurate bookkeeper. This situation, which no doubt was rather acceptable to the defendants involved in those cases, was a blow to the pride of the Accountancy Institutes and a spur towards improved standards.

The modern attitude in the profession is that an accountant should approach his work intelligently and critically. Accountancy records are no more than a numerical representation on paper of facts. A mere bookkeeper can become divorced from reality in a world of figures. An accountant, at least when employed as an auditor, should be continually on the alert to make sure that his figures are a full and fair representation of the facts as they actually exist.

The courts have always drawn a distinction in the standard required from an accountant taking out accounts and an auditor investigating the accuracy of prepared accounts submitted to him. This distinction was summarized by ASTBURY, J., in *The Trustee of the Property of Apfel* (*a bankrupt*) v. *Annan Dexter & Coy.* (1926), LXX Acct. L.R., pp. 57-69. The learned Judge

pointed out that accountants who were merely engaged to take out a client's accounts were not responsible for the entries in the books, as to their correctness or otherwise, but were only responsible for ascertaining from the books, when made up to the best of their ability, the position of the business as so shown. On the other hand, auditors are responsible for ascertaining the true position of the business, whether disclosed properly by the books or not. Consequently most of the important reported cases are concerned with accountants in their role of auditors.

In the *Kingston Cotton Mill Case* (1896), Acct. L.R. p. 77, LOPES, L.J., made the following remarks as to the duties of an auditor:—

> "An auditor is not bound to be a detective or, as was said, to approach his work with suspicion or with a foregone conclusion that something is wrong.... He is a watch-dog but not a bloodhound.... He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume they are honest and to rely upon their representations provided he takes reasonable care. ... The duties of auditors must not be rendered too onerous. Their work is responsible and laborious, and the remuneration moderate."

This mild interpretation of an auditor's duties has often been quoted since, and appears to have been a major impediment to recognition by the courts of the great improvement in professional standards that has taken place since that date. For instance, forty years afterwards, we find SWIFT, J., in *Pendlebury's Ltd.* v. *Ellis Green & Coy.* (1936) 80 Acct. L.R. 39, quoting the dictum of LOPES, L.J., and applying it in the following terms:—

> "The defendants acted towards the plaintiff company in the relation of watchdogs; Mr. Elliott, on the other hand, has acted as a bloodhound. He was called in for the very purpose; he was called in 'to be a detective' and 'to approach his work with suspicion or with a foregone conclusion that there is something wrong'."

The learned judge therefore exonerated the watch-dogs for failing to find out what the bloodhound had found out and entered judgment for the defendants.

It is submitted that, although the proper professional approach should not necessarily involve suspicion or assumption of something being wrong, it should involve a zeal to take nothing for granted, but rather to probe and test every item. In particular, it should be made sure that every asset appearing in a balance sheet really exists, that it is owned by the client and appears at a proper valuation. Equally it must be ensured that every item on the liability side is accurately stated at the amount shown, and that no liabilities have been omitted.

The duty of secrecy is a wide one and applies to all persons who by virtue of their profession or employment become apprised of confidential information pertaining to the affairs of their clients or employers. The duty of the accountant in this regard is no different in quality from that applying to many other such persons, but his liability for breach is likely to be the heavier because his avocation gives him such ample and detailed knowledge of his employer's financial affairs. A recent English decision in the Chancery of the County Palatine of Lancaster, *Fogg* v. *Gaulter and Blane* (1960), 90 L.Jo. 718, throws interesting light on the extent of this duty. There it was held that a firm of accountants preparing income tax returns for a person has a duty of secrecy to that person, and to his legal personal representatives, even though the actual work done was commissioned, and paid for, by someone else.

CURRENT LEGISLATION

COMMONWEALTH

Crimes Act 1960, No. 84.
Assent: 13 December 1960. Amending Crimes Act 1914-1959.

High Court Rules 1952, No. 23.
Order 67A, special cases under the Matrimonial Causes Act 1959. Gazetted 9 February 1961.

Matrimonial Causes (Affinity) Regulations.
Com. S.R. 1961, No. 13. Gazetted 26 January 1961.

Nationality and Citizenship Act 1960, No. 82.
Assent: 13 December 1960, substituting s. 36. Reinstatement in support of application for registration or naturalization.

SOUTH AUSTRALIA

Hire Purchase Agreements Act 1960, No. 69.
Assent: 1 December 1960, to come into operation on Proclamation.

Landlord and Tenant (Control of Rents)Act (Amendment) Act 1960, No. 70.
Assent: 1 December, amending ss. 40, 42 and 123 of the Landlord and Tenant (Control of Rents) Act 1942-1955.

Motor Vehicles Act (Amendment) Act (No. 2) 1960, No. 55.
Assent: 24 November 1960. Amending Motor Vehicles Act 1959, part in operation on date of assent, part to come into operation on Proclamation.

WESTERN AUSTRALIA

Companies Act (Amendment) Act (No. 2) 1960, No. 78.
Assent: 12 December 1960, to come into operation on Proclamation, inserting a new Part IIIA, ss. 98A-98N, interests other than shares, debentures, etc.

REPAIR OF HIGHWAYS — A POWER OR A DUTY?

by

JANET M. SUMMERS, B.A., LL.B.

The common law principle that a public authority having powers of repair and maintenance of roads cannot be made civilly liable to persons injured through its failure to exercise those powers, may well be regarded as an anomaly in an era in which such authorities are financed from taxes imposed, *inter alia*, on vehicle owners and road hauliers.

Although this rule had its origin in Great Britain in the common law liability of the inhabitants of parishes or counties to repair roads,[1] which was later transferred by statute to local authorities and may have been justified in a time when the financial resources of such bodies were quite inadequate for their functions, it has been retained and even extended, so as to exempt authorities exercising statutory powers from liability unless express provision is made for compensation to persons injured.[2]

As far as bodies exercising road maintenance and repair functions[3] are concerned, they are civilly liable for damage to a road user only where they have taken positive action to alter the condition of a road under their control, for misfeasance of a power once exercised does not confer the same immunity as a complete failure to exercise such power, that is, as non-feasance. Even then, the distinction between non-feasance and misfeasance has been interpreted by both English and Australian courts in favour of defendant councils and merely because an authority has taken some steps to repair a road within its area of control, the defence of non-feasance is not automatically excluded. Thus in *Buckle* v. *Bayswater Road Board*,[4] DIXON, J., distinguished those cases "in which the operations of the road authority put the highway in a condition perfectly proper and safe, but liable in the course of time through wear and tear and deterioration to become unsafe" from those "in which but for continual subsequent safeguards the work actively done by the road authority would make the highway dangerous". In the former class, a plaintiff must prove, not only that the

[1] *Buckle* v. *Bayswater Road Board* (1936), 57 C.L.R. 259, per Latham, C.J., at p. 268.

[2] *Young* v. *Davis* (1863), 2 H. & C. 197.

[3] Where an authority is exercising some other function, such as traffic control (*Skilton* v. *Epsom & Ewell U.D.C.*, [1937] 1 K.B. 112; [1936] 2 All E.R. 50), sewerage (*Newsome* v. *Darton U.D.C.*, [1938] 3 All E.R. 93) or agricultural drainage (*Buckle* v. *Bayswater Road Board* (1936), 57 C.L.R. 259), it will be liable for failure to repair or maintain its constructions under ordinary principles of negligence and nuisance. This exception has also been expressed in the view that an authority, exercising multiple functions, will be liable if it allows an "artificial structure", such as a drain which does not form part of the road fabric, to fall into disrepair: *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256, and McTiernan, J., in *Buckle's Case*.

[4] (1936), 57 C.L.R. 259, per Dixon, J., at 283-6.

condition of the road was the cause of his injuries, but that it was a proximate consequence of the mode of construction or repair adopted, for the development of a dangerous condition as a result of normal usage is regarded as arising from a failure to repair, entitling an authority to raise the defence of non-feasance.

In *Gorringe* v. *The Transport Commission (Tasmania)*,[5] the High Court discussed the ambit of the non-feasance defence in an action brought for damages for loss of a vehicle, load and recoupment of worker's compensation, following an accident caused by the collapse of a section of road over a culvert after heavy rains. The defendant had from time to time effected surface repairs by filling in recurrent depressions in this part of the road, which had resulted partly from usage and partly from decay of the road decking over the culvert. It was argued that the recurrence of the ruts in the surface fabric indicated the need for radical repairs and that the Commission had actively and negligently increased the dangerous condition of the culvert.

The Court[6] considered, however, that the Commission would only be liable in negligence if the evidence showed either that the actual repairs carried out by the Commission were a proximate cause of the collapse of the culvert decking, or, that the Commission's repairs were intended to prevent such collapse. Since the evidence showed that the Commission's work was intended only to improve the surface level and there was no positive evidence that such work in fact weakened the decking or supporting bank, the Commission had "failed to exercise in full measure the power to repair the road which it possessed" and was therefore able to escape liability by pleading non-feasance.

It is insufficient, therefore, for a plaintiff to show that a road authority knew or ought to have known of the need for basic repairs, but carried out only superficial ones, unless there is strong evidence that such repairs in fact produced or increased the dangerous condition which resulted in damage to the road user. The recent Court of Appeal decision in *Burton* v. *West Suffolk County Council*[7] affirmed the principle that inadequate repair work is viewed in favour of the defending authority and will confer a greater protection on it than any defence of sufficiency.

The Full Court of N.S.W.[8] also considered the liability of a local council sued in negligence and nuisance recently for damage caused to a car which got out of control and skidded on a road surfaced and repaired by the defendant's statutory predecessor. Affirming the trial judge's direction to the jury to return a verdict for the Council, OWEN and HARDIE, JJ. (HERRON, J., dissenting), held on appeal that the evidence did

[5] (1950), 80 C.L.R. 357.

[6] Latham, C.J., and Dixon and Fullagar, JJ.

[7] [1960] 2 All E.R. 26.

[8] *Florence* v. *Marrickville Municipal Council* (1960), 77 W.N. (N.S.W.) 471.

not indicate any negligence in the construction and subsequent repair of the road, so that the Council could not be regarded as liable for misfeasance of its powers. Nor in their opinion was its omission to make further repairs when the need arose to be regarded as misfeasance, since the deterioration of the road surface arose from natural wear and tear and not from any neglect in the work done.[9]

In deciding whether an authority has been guilty of misfeasance in respect of any work carried out, DIXON, J., in *Buckle's Case,*[10] approved by OWEN, J., in *Florence* v. *Marrickville Municipal Council,*[11] stated that the adequacy of the work should be "judged according to standards of time and circumstances then prevailing". It is suggested, however, that some account should be taken of the period for which it could be regarded as satisfactory and the regularity with which the authority makes repairs. Clearly any road, despite skilful design and construction, will deteriorate over a period of years and repairs, however carefully executed, will not prevent the development of dangerous conditions and may, in fact, merely obscure it. Recent decisions support the view, however, that unless an authority actively encourages the development of a dangerous condition, or places an obstruction on a highway and fails to take proper steps by lighting or guarding to protect the public, it will not be liable either in nuisance or negligence for any damage suffered by a user. Confirmation of this is provided by *Burton's Case,*[12] where the local authority guarded against one type of danger, namely flooding, by the use of red flags, but ignored another, namely icing of the road surface after the subsidence of the flood water. Failure to give warning of icy patches was not regarded as evidence of negligence by the authority, so as to make them liable for damage caused by skidding to a car owner. On this point the Court of Appeal approved the judgment of SCRUTTON, L.J.,[13] in *Sheppard* v. *Glossop Corporation,* who, in discussing an existing danger not created by the road authority, stated that "It is left to their discretion to light or not to light; therefore they need not light at all; if for a time they light they may discontinue either wholly or partially in point of time or in point of space and the mere discontinuance is no breach of duty. That is, of course, subject to this; that if they place an obstruction in the highway they must by lighting or warning, or by watchmen or fences or other reasonable means, guard against the danger they have themselves created".

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[9] Herron, J., dissented on this ground: (at p. 478) "In my opinion there is evidence that the danger which caused the accident to occur was one connected, in a relevant sense, with that improper patching and goes beyond the natural development or non-feasance type of case."

[10] (1936), 57 C.L.R. 259 at pp. 284-5.

[11] (1960), 77 W.N. (N.S.W.) 471 at p. 474.

[12] [1960] 2 All E.R. 26.

[13] [1921] 3 K.B. 132 at p. 145.

In *Burton's Case* the defendant Council successfully pleaded the non-feasance defence on the ground that it had only partly mitigated the drainage problem in the section of the road in question and such work as it had carried out had been done without negligence. The court firmly rejected the view of LUSH, J., in *McClelland* v. *Manchester Corporation*,[14] as had the High Court in *Gorringe's Case*, that "Once establish that the local authority did something to the road and the case is removed from the category of non-feasance" as imposing too heavy a liability on highway authorities, since the execution of any repair work would then make them liable for all damage arising from the condition of the road, "whether or not that which the authority did had any relation to the resulting damage".[15]

In conclusion, it is submitted that judicial distortion of the term "non-feasance" has left highway authorities in a highly-privileged position in respect to private suits for damage resulting from the condition of roads within their control. Where a road has been allowed to deteriorate over a period, it is necessary to prove not only that its condition was the proximate cause of the damage in question, but that the condition resulted from initial negligence in the execution of construction or repair work by the authority. Nor will liability arise from any failure to carry out repairs, even where an authority has notice of a dangerous condition and failure to give warning of such a condition will not be regarded as actionable negligence, unless the authority has actively created or increased the danger.[16]

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[14] [1912] 1 K.B. 118 at p. 127.

[15] (1950), 80 C.L.R. 357 at p. 364, per Latham, C.J.

[16] *Sheppard* v. *Glossop Corporation*, [1921] 3 K.B. 132; *Wilson* v. *Kingston upon Thames Corporation*, [1949] 1 All E.R. 679.

INTERNATIONAL LAW ASSOCIATION — AUSTRALIAN BRANCH

The Australian Branch of the International Law Association was formed in August, 1959, and had an Australia-wide membership of 97 by the end of its first year, including several members of Federal Parliament, numerous Justices, Solicitors-General, University Professors and Lecturers, Senior and Junior Counsel, Solicitors and the Chamber of Commerce.

There are twelve active, and three in formation, *International* Committees. Prior to August, 1959, two Australians (Professor Zelman Cowen on "Enforcement of Foreign Judgments", and Mr. T. K. Hodgkinson on "Trade Marks") were on such Committees. Dr. P. O'Connell became a member and Rapporteur in 1960 of an International Committee dealing with the subject "Succession of New States to the Treaties and Certain Other Obligations of Their Predecessors". Dr. J. Leyser became a member in 1960 of the International Committee on "Legal Aspects of Problems of Asylum".

There are "*Sub*-Committees" of some of said International Committees. For instance, there are four Sub-Committees dealing with "United Nations Forces", "Self-Defence and the Use of Prohibited Weapons", "The International Court of Justice", and "The Changing Role of the Secretary-General"; all under the International Committee subject, "The Charter of the United Nations". Professor Julius Stone is a member of the first and second-named Sub-Committees.

There are also "*National* Committees" (i.e., Branch Committees) working for and in co-operation with the aforesaid International Committee subject. Professor N. C. H. Dunbar is a member of the U.K. National Committee on "The Charter of the United Nations".

In short, Australian membership of the aforesaid Committees has risen in a very short period from two to seven, and as there are only twelve active Committees and three in formation, Australian representation today is regarded as a very satisfactory development of our Branch.

The following will show additional developmental association between members of our Branch and the fifteen Commitees.

Very recently fifteen Sydney members, two from Melbourne, and one from Brisbane, Hobart, Adelaide and Perth, of our Branch have become "corresponding members" with twelve International Committees, namely, our President, Mr. Justice Wallace, Q.C., Professor Julius Stone, Mr. J. G. Starke, Q.C., Dr. F. Louat, Q.C., Miss H. E. Archdale, Dr. K. J. Koenig, Dr. Enid Campbell, Mr. K. R. Handley, Mr. J. A. Redmond, Professor F. R. Beasley, Mr. G. H. Bullock, Mr. D. L. Mahoney, Mr. S. Sudano, Dr. W. C. Castles, Mr. J. J. Doyle, Mr. E. St. John, Q.C., Professor N. C. H. Dunbar, Dr. R. D. Lumb, Mr. K. R. Reed, Mr. M. J. Strong and Mr. S. Conway. The twelve

subjects to which they will devote their attention are — "Uses of the Waters of International Rivers", "Restrictive Trade Practices", "Air and Space Law", "Enforcement of Foreign Judgments", "Review of United Nations Charter", "Nationalization and Foreign Property", "Peaceful Uses of Atomic Energy", "Legal Aspects of Problems of Asylum", "Commercial Arbitration (International)", "Family Relations", "Trade Marks" and "Monetary Law". It is expected shortly that other members, both Interstate and Intrastate, will become "corresponding members". This extent of co-operation by our members as "correspondents" is also very satisfactory.

Two Sydney members are at present studying the law concerning "The Reciprocal Enforcement of Foreign Judgments" and will furnish a report to our Branch Executive Committee.

The matter of the creation of sub-branches Interstate is under consideration at the present time by the Executive Committee and certain members resident outside New South Wales.

In the past sixteen months addresses have been given in Sydney—at well-attended public meetings—by Professor Julius Stone, Dr. Hofmannsthal, Sir Percy Spender, Sir Kenneth Bailey and Sir Garfield Barwick. Their respective subjects were — "United Nations Forces", "Problems of Expropriation", "Some Aspects of the Jurisdiction of the International Court of Justice", "The Law of the Sea" and "The Executive Powers of the United Nations". Other addresses will be given during 1961.

Twelve members of our Branch attended the 54th Congress of the I.L.A., held in August 1960 at Hamburg, with myself as the representative of the Branch on the Headquarters Executive Council. Six hundred people from all countries attended said Congress. It was a most inspiring experience and I came away with the greatest respect for the spirit which permeated its activities, and admiration for those who give so much of their time and money in an endeavour to improve the relations between the people, and the countries, of the world.

T. K. HODGKINSON,

Secretary.

CASE NOTE

Negligence

Legal causation — Liability for consequences of wrongdoing — Test of reasonable foreseeability or direct consequence.—In the present case, furnace oil from a ship was spilt into a bay through the carelessness of the appellants' servants. The oil ignited and a fire, fed initially by the oil, caused considerable damage to the respondents' wharf and the equipment thereon. The respondents sued the appellants for damages for negligence and the trial judge found that the appellants "could not reasonably be expected to have known" that the furnace oil "was capable of being set afire when spread on water".

The Privy Council held that the criterion for determining compensation was the same as that for determining liability, namely reasonable foreseeability. The essential factor was whether the damage was of such a kind as the reasonable man should have foreseen. The Board rejected the proposition laid down in *Re Polemis and Furness Withy & Co., Ltd.*, [1921] 3 K.B. 560; [1921] All E.R. Rep. 40, that if the defendant was guilty of negligence he was responsible for all the consequences of the negligent act or omission whether reasonably foreseeable or not so long as they were "direct". It did not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which resulted in some trivial foreseeable damage the actor should be held liable for all its consequences however unforeseeable and grave, as long as they could be said to have been "direct". It is a principle of civil liability that a man has to be considered responsible for the probable consequences of his act. To demand more than this would be too harsh, whilst to demand less would be to ignore that civilized order requires the observance of a minimum standard of behaviour.

VISCOUNT SIMONDS, delivering the judgment of their Lordships, referred to numerous instances of deviation from the rule in Polemis, including those expressed by LORD RUSSELL OF KILLOWEN in *Hay* v. *Young*, [1943] A.C. 92 at p. 101; [1942] 2 All E.R. 396 at p. 401, and by VISCOUNT SIMON in *Woods* v. *Duncan*, [1946] A.C. 401; [1946] 1 All E.R. 420. His Lordship also pointed out that Polemis had been rejected in Scotland. Accordingly, the authority of Polemis had already been severely shaken and it could not be said to have been a decision of such long standing that it ought not to be reviewed. In their Lordships' opinion the proposition asserted in Polemis should no longer be regarded as good law. It would be wrong to hold a man liable for damage unpredictable by a reasonable man merely because it was "direct" and equally it would be wrong that the former should escape liability however "indirect" the damage if he foresaw or could reasonably foresee the intervening events which led to its being done. The effective test was that of foreseeability: *Overseas Tankship (U.K.), Ltd.* v. *Morts Dock & Engineering Co., Ltd.*, [1961] 1 All E.R. 404.

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